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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

A. ROBERT KLEINER, ROSIE BOARD, FRANCIS BROUILLETTE AND ERMA LURVEY, Democratic Members of the Michigan Commission on Legislative Apportionment,

Appellants,

vs.

RICHARD SANDERSON, CLARE DANIELS, JOHN PAYANT AND LOU ANN TAYLOR, Republican Members of the Michigan Commission on Legislative Apportionment,

Appellees.

On Appeal From the Supreme Court of Michigan

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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I.

APPELLEES MISSTATE THE DECISION BELOW, APPELLANTS' ARGUMENTS AND APPLICABLE LAW.

> "We applaud the willingness of state courts to assume jurisdiction and render decision in cases involving challenges to state legislative apportionment schemes. *However, in determining the validity of a State's apportionment plan, the same federal constitutional standards are applicable whether the matter is litigated in a federal or a state court.*" *Maryland Committee For Fair Representation* v *Tawes*, 377 U.S. 656, 674 (1964). (Emphasis added.)

Although it is indisputable that the decision below if rendered by a federal court would be reversible, *Chapman* v *Meier*, 420 U.S. 1 (1975); *Connor* v *Finch*, 431 U.S. 407 (1977); *Wise* v *Lipscomb*, 437 U.S. 535 (1978), appellees would excuse that decision because it was rendered by a state court.

Arguing against straw men and defending a romanticized version of that aberrational order, appellees would avoid its review by mischaracterizing appellants' challenge as merely doubting "state action" below and as seeking review of a state court interpretation of state law.

But these characterizations misstate the decision below as well as the appellants' arguments and applicable law.

As to the decision itself:

(1) It holds, as a matter of *federal* law, that there is a *per se* rule of "allowable [population] divergence [of] at least 16.4 percent." 413 Mich., at 115; 25a.

(2) Far from adopting a plan which "departed from absolute population equality only to the extent necessary to preserve "political subdivision boundaries" (Motion to Dismiss or Affirm, p. 4), the court-ordered plan foreseeably *maximized* deviations from population equality, with resulting population variances of nearly 40,000 among Senate districts (16.24%) and

14,000 persons among House districts (16.34%). Moreover, "application of the Court's criteria accentuate[d] the extreme and not the norm" (Moody, J., dissenting, 254a), so that districts clustered at either end of the "allowable" 16.4% population range. And the Court considered but rejected several alternative plans of legislative apportionment which more closely approximated equality of population — including one substantially adhering to the avowed standard of following political subdivision boundaries (see below) — merely because the plans' sponsors were "members of the commission [, which] is no longer viable." 413 Mich., at 142, n. 27; 85a.

(3) Although the extraordinary result below is sought to be justified under the rubric of "the effectuation of a rational state policy," that purported policy was enunciated in a decision which struck down *all* Michigan constitutional provisions relative to legislative apportionment (except the number of single-member districts) 413 Mich., at 139, n. 24; 78a, and which authorized the Michigan legislature to enact an apportionment plan in disregard of any such "standards." 413 Mich, at 142-143; 85a-86a.

Appellees' characterization of appellants' arguments and of applicable law are equally far from the mark.

Appellees largely devote their brief to the straw man argument that appellants would have this Court review a state court interpretation of state law. Relatedly, they portray appellants as disputing that action by a state court is as much "state action" as is action by a state legislature itself (Motion to Dismiss or Affirm, p. 12).

But appellants do not question that state courts are the final arbiters of state law or that state supreme court "action" is "state action."

Yet neither proposition has anything to do with the principles enunciated and developed in *Chapman* v *Meier*, *Connor* v *Finch* and *Wise* v *Lipscomb*, *supra*, that a court is held to a higher standard when adopting its own plan of legislative ap-

portionment than when reviewing a plan of legislative apportionment adopted by a legislature itself, as in *Mahan* v *Howell*, 410 U.S. 315 (1973). Contrary to appellees' assertions, the distinction is not between *federal*- and *state*- court-ordered plans, but between *court*-ordered plans and *legislatively*-adopted plans. This analysis is compelled not only by the proposition that, "in determining the validity of a State's apportionment plan, the same federal constitutional standards are applicable whether the matter is litigated in a federal or a state court," *Maryland Committee For Fair Representation* v *Tawes*, 377 U.S. 656, 674 (1964), but by the essential rationale in the above-cited cases, which distinguish between court-ordered and legislatively adopted plans. "This rule of deference to local legislative judgments," *Wise* v *Lipscomb*, *supra*, 437 U.S., at 548 (concurring opinion, by Powell, J.), presupposes the exercise of "a *legislative judgment, reflecting the policy choices of the elected representatives of the people*, rather than the remedial directive of a federal court." *Id.* (Emphasis added.) That legislative judgment is significant since legislative apportionment has repeatedly been emphasized by this Court to be fundamentally a matter of legislative responsibility in the first instance, which the courts should make every effort not to preempt, *Wise* v *Lipscomb*, 437 U.S. 535, 539 (1978); *Connor* v *Finch*, 431 U.S. 407, 414-415 (1977); *Chapman* v *Meier*, 420 U.S. 1, 27 (1975); *Gaffney* v *Cummings*, 412 U.S. 735, 749 (1973); *Burns* v *Richardson*, 384 U.S. 73, 84-85 (1966).

Accordingly, in urging that the Michigan Supreme Court was entrusted with no such policy choices and "lack[ed] the political authoritativeness that the legislature can bring to the task," *Connor* v *Finch*, 431 U.S. 407, 415, appellants do not disparage the authority of the Michigan Supreme Court to interpret state law. Rather they point out, more relevantly, that, "a state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the

constitutionally mandated framework of substantial population equality." *Id.*, 414-415.

It is for that reason that this Court in *Chapman* v *Meier*, *Connor* v *Finch* and *Wise* v *Lipscomb* emphasized, not the distinction between federal and state courts which appellees urge and which *Maryland Committee* v *Tawes*, *supra*, disapproved, but the distinction between an apportionment plan adopted by the elected policy representatives of the people and one adopted by a court in a judicial, remedial role after legislative default. It was precisely on that basis that in *Wise* v *Lipscomb*, *supra*, a reapportionment plan adopted by a municipal council, albeit solely under court authorization, was deemed to be subject to the more lenient standards of *Mahan* v *Howell* than the stricter standards of *Chapman* and *Connor*.

Moreover, the decisions in *Chapman* and *Connor* did not turn, contrary to appellees' assertions, on defective district court readings of state constitutional policy, but on the application of defective federal standards. Thus, while appellees point to the purported Michigan standard of substantial adherence to political division boundary lines as justifying the result below, that was the same, well-identified Mississippi standard "insistent adherence [to which had] resulted in the invalidation of three successive legislative apportionments as constitutionally impermissible." *Connor* v *Finch*, 431 U.S. 407, 419. It was because there were no " 'unique features' of the Mississippi political structure as would permit a judicial protection of county boundaries in the teeth of the judicial duty to 'achieve the goal of population equality with little more than *de minimis* variation,' *Chapman* v *Meier*, *supra*, at 26-27," *Connor* v *Finch*, 431 U.S. 407, 420, that this Court struck down the lower court's reliance on that rationale. Here, the Michigan court similarly has cited no unique state policy, but has only misread *Mahan* v *Howell* as a *per se* rule of 16.4% "allowable divergence."

Appellees trivialize appellants' concern for the race to the courthouse, asserting that now that the Michigan Supreme

Court has spoken as to Michigan "state policy," federal courts hereafter need only take heed. Translated, this means that, barring correction by this Court in the present case or in the unlikely event of an intervening state constitutional amendment, a federal district court in Michigan will hereafter be empowered, indeed required, to apply a 16.4% standard of "allowable [population] divergence." This would be true despite the incontrovertible proposition, which even appellees acknowledge is applicable to federal courts, "that in two important respects a court will be held to stricter standards in accomplishing its task than will a state legislature: '[U]nless there are persuasive justifications, a court-ordered reapportionment plan of a state legislature must avoid use of multi-member districts and, as well, must ordinarily achieve the goal of population equality with little more than *de minimis* variation.' " *Connor* v *Finch*, 431 U.S., at 414, citing *Chapman* v *Meier*, 420 U.S., at 26-27. This will be true despite anything even purportedly "unique" about Michigan's devotion to following the lines of political subdivisions.

To state the proposition is to answer it.

II.

THE MICHIGAN SUPREME COURT REJECTED ALTERNATIVE PLANS WHICH MORE CLOSELY APPROXIMATED EQUAL POPULATION AND SUBSTANTIALLY ADHERED TO POLITICAL DISTRICT BOUNDARIES.

Appellees portray the Michigan Supreme Court's decision as one combining a faithful adherence to a legitimate state policy of maximum adherence to political district boundaries, and of a striving for equality of population.

In fact the Court's actions belie that portrayal.

Among the alternative proposals for legislative districting which were submitted to but rejected by the Court, 413 Mich. at 142, n. 27; 85a, was one proposed by appellants Board and Kleiner which substantially adhered to political district boundaries while also achieving far greater equality of population than the Court's own later-ordered plan.

Specifically, the Board-Kleiner plan would have in the Senate maintained intact the boundary lines of 1233 of the state's 1245 townships, 250 of its 256 cities, and 49 of its 83 counties. In the House, the plan would have maintained intact 1160 of the state's 1245 townships, 230 of its 266 cities and 35 of its 83 counties. All of this would have been accomplished within a population range of 0% in the Senate and 0% in the House. Although fewer political subdivision "breaks" were present in the Court plan*, many did occur and population equality was sacrificed under the 16.4% "standard."

Since under even the Court's own plan there are many "breaks" in political subdivision boundaries and at the cost of substantial population equality, the Michigan Court's actions

*According to the Court's own analysis of the Apol plan, in the House, "The number of county breaks is 10. The number of city/townships moved over a county line is 27. The number of city/township lines broken is 13." 413 Mich., at 207; 229a-230a. In the Senate, "The number of county breaks is 4. The number of city/township moves in the county breaks is 6. The number of city/township lines broken is 1 (Detroit)." 413 Mich., at 209; 232a.

"illustrate a departure from its own announced standards," *Connor* v *Finch*, 431 U.S. at 424, which further makes indefensible the Court's significant departure from acceptable application of the equal-population-as-nearly-as-practicable standard.

CONCLUSION

For all of the foregoing reasons, the Motion to Dismiss or Affirm should be denied, and this Court should not probable jurisdiction of this appeal.

Respectfully submitted,

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